No. 547

In the Supreme Court of the United States

NELLIE ALLEN POAGUE,

Petitioner,

vs.

BUTTE COPPER AND ZINC COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONER

The District Court in entering judgment for the plaintiff therein, Poague, who is petitioner here, had submitted the case to a jury, and the judgment was on a verdict which, of course, implies that every inference which might be drawn from the testimony favorable to the plaintiff, had been found in plaintiff's favor. R. 11.

In reciting case after case wherein adjacent owners, who are lessors, have been held liable under circumstances additional to the rule of liability as owner, there is a tacit admission throughout the reply brief of the respondent, that the decision of the Circuit Court of Appeals went further than permitted under the law, "That under the facts in this case, appellee is not entitled to recover from appellant." R. 441.

On page 17 of the brief is an inaccurate statement. The respondent asserts "In this connection, is should also

be pointed out that petitioner's property lies on the surface of the Nellie Lode Mining Claim. (R. 176). There is no record of any mining ever having been done on the Nellie. The mining, according to the record, was all performed in the Emma Mine." The speciousness of this statement, and its inaccuracy, even appears from the following language in the brief itself: "The Emma Vein apexes 500 feet north of the Poague property (R. 199-200), and has been mined from the 200-foot level to the 2200-foot level down slope of the vein (R. 290), which on its dip extralaterally passes beneath the Petitioner's lots 600 to 800 feet below the surface." The defendant owned also the Emma Mine. (R. 380 and R. 371.)

As pointed out in Petitioner's brief, page 1, in the year 1918, the excavation ran under the Poague property, R. 302. That this actual invasion of Poague's property by the lessee was known to the lessor owner, could have been well found by the jury, as also that such knowledge existed before the execution of the agreement of extension of date July 8, 1936, R. 384, and, of course, before the agreement of further extension of July 8, 1941, and before the lease of June 24, 1940. This brings the liability of the lessor directly within the language quoted from the American Law Institute, Restatement of Torts, on page 19 and 20, Respondent's Brief. "Where, however, the lessor makes the lease under the condition stated in clauses (a) and (b), he subjects himself to liability."

At page 294, subsections (a) and (b) of Section 837, read as follows:

> (a) "At the time when the lease was made, renewed or amended, the lessor consented to the carry-

ing on of the activity, or knew that it would be carried on, and

(b) "The activity, as the lessor should have known, necessarily involved, or was already causing such an invasion."

The removal of *subjacent* support, without permanently maintaining artificial support, is certain, eventually, to cause the surface to settle. A jury would hardly be allowed to deny that. The law also draws a strong inference as to the effect of removal of subjacent support.

"IMPORTANT FACTORS IN REASONABLE CONDUCT. The requirement of reasonable conduct emphasized in comment (e), 819, in respect to lateral support is applicable to the subjacent support, but it produces a different result. In the case of subjacent support, the owner of the supported land is normally unable to provide artificial support for his land to replace subjacent support that may be withdrawn. This comparative helplessness of the owner of the supported land weighs heavily against the utility of the conduct of the owner of the supporting land in withdrawing the subjacent support. The legal regard for the interest of the owner of the supported land and the recognition of his helplessness tend to outweigh the utility of the conduct of the owner of the supporting land, and makes conduct on his part, which would be reasonable in respect to lateral support, unreasonable in respect to subjacent support. Thus the standard of conduct required of the actor in respect to subjacent support is so high that his liability for negligence approximates the absolute liability stated in 820."

American Law Institute, Restatement of the Law Torts, Vol. 4, Subdivision C, Sec. 821.

Whether, when the new extensions took place, or previous to 1918, the invasion had been made by the owner or by another, is not important. It was the duty of the owner, lessor, to see that excavations under the land of Poague be properly supported, and it could not delegate this duty to another by any of the subsequent leases so as to absolve itself from liability. A jury can certainly find that the removal of subjacent support amounts to a nuisance, or necessarily operates to injure or destroy the property of the owner of the surface ground *unless* artificial support is maintained permanently.

This court has spoken of non-delegability of duties of an owner of property so as to absolve himself from liability, though doing work on his property through an independent contractor or lessee, if such work, of itself, will injure his neighbor unless certain precautions are taken by the lessee, or independent contractor, where the work that the lessee or contractor is to do, of itself, amounts to a *nuisance or necessarily operates to injure or destroy the property of plaintiff.*

Weinman v. DePalma, 232 U. S., p. 570; 58 L. Ed. 733;

Robins v. Chicago City, 4 Wallace 657.

Analogous to the above doctrine is the public duty owed by a lessor railroad, under its charter, to a member of the public injured by the lessee actively operating the leased lines.

North Carolina Ry. Co. v. Zachery, 232 U. S. 248; 58 L. Ed. 591.

In Catron v. South Butte Mining Co., 181 Fed. 941, C. C. A. 9th, the plaintiff obtained a decree enjoining defendants, who were admitted to own the minerals beneath the surface, from extracting the same in any way so as to injure the surface; the injunction was based upon the common law right of support. Could the owner, owning the minerals, evade liability for breach of that injunction by leasing his land to another for the purpose of extracting the minerals? We think not. The duty resting on the owner to sustain with his land lateral and subjacent support arises as well from law as it did in the *Catron case* from injunction based on the law.

> "LIABILITY FOR REMOVING THE SUBJACENT SUPPORT OF LAND:—Since the leading case of *Humphries v. Brogden,* it does not appear to have been doubted, either in England or America, that prima facie, the owner of the surface land is entitled, *ex jure naturae,* to have his land supported by the subjacent strata, and that one having a right to win minerals beneath is bound to leave sufficient ribs or columns to support the soil at the surface, or pay the damages which may result from its subsidence; and if such subsidence is caused by reason of his not leaving sufficient support, it will be no defense that he worked the mines carefully and according to custom."
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> Thompson on Negligence, p. 1013.

The question exposes a particular application of a general rule. Where there is any kind of a legal duty resting on one, responsibility for doing the duty cannot be shifted so as to free the one primarily liable from liability, if there is a breach by the independent contractor or lessee

doing, by agreement, work likely to result in injury to the obligee unless certain precautions are taken.

The magnitude of the subsidence of whole city blocks presents evidence that many years of mining were needed to produce the result, and that the owner preserving in all the leases, its right to inspect, certainly cannot claim ignorance of the failure of its lessee to be doing the duty cast by law on itself. This evidence was enough to create an inference of breach of duty on the part of defendant.

A covenant to protect the surface is implied, and creates an absolute right to surface support.

Williams v. Hay, 120 Pa. 485; 14 Atl. 379;

Catron v. South Butte Mng. Co. (C. C. A. 9th), 181 Fed. 941.

Can any appellate court presume that there were no experienced miners on this jury, permitted to use for deliberation, their knowledge gained from experience?

Knowledge of the owner of a dangerous condition of his own premises may be presumed from its existence for a period of time varying on circumstances. To hold that defendant did not know, in a few weeks after it happened, that workings on its vein had in 1918 gone under Poague's property, is against all human experience.

(Of course, if a review is granted, the volume of the excavations will appear from maps in exhibit. The jury saw such.)

As said by defendant in brief, the excavation passed under Poague's property 600 to 800 feet deep. O'Kelly said 12 cubic feet of Butte granite make a ton, i. e.: At 600 feet there was 50 tons,—100,000 pounds of weight

above every square foot. R. 299. It is not a solid mass. The average size of a block of Butte granite is less than five cubic feet. It is an accepted truth that solids flow under pressure. R. 299-R. 298. In 1918 there was a cause that would inevitably finally destroy plaintiff's property unless extraordinary precautions were taken, *and maintained.*

We respectfully submit the Writ should be granted, and the decision of the Honorable Circuit Court of Appeals should be reversed, and the judgment of the trial court affirmed.

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